UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Hotel Stanford, LLC, d/b/a The Avalon
and K&H Management Corp.

Employer

and **Case No. 2-RC-22696**

Local 758, Hotel & Allied Services Union,
SEIU, AFL-CIO,

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Nancy Slahetka and Nicholas H. Lewis, hearing officers of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding,[1] it is found that:

1. The Hearing Officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

2. The parties stipulated and I find that Hotel Stanford, LLC, d/b/a the Avalon (Employer), is a New York corporation with an office and place of business located at 16 East 32nd Street, New York, New York, the sole facility involved herein, and is engaged

[1] Briefs, filed by Counsel to the Union and the Employer, Hotel Stanford, LLC, d/b/a the Avalon have been carefully considered. Counsel to K&H Management Corp. elected not to file a brief.

[2] At hearing, the Avalon objected to questioning related to a finding of alter ego status, arguing that they lacked relevance in a representation case. For the reasons set forth below, I hereby affirm the Hearing Officers' rulings allowing the questioning.

in the hotel industry. Annually, in the course and conduct of its business operations, the Avalon derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $5,000 directly from suppliers located outside New York State. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Local 758 Hotel and Allied Services Union, SEIU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent all service and maintenance employees, including bellpersons, front desk clerks, housekeeping workers, housemen, laundry workers, maintenance workers, minibar attendants, and room attendants, employed at the Avalon's facility located at 16 East 32nd Street, New York, New York, excluding all office clerical employees, managerial employees, professional employees, supervisors and guards as defined in the Act.[3]

The Employer Avalon contends that the housekeeping workers, housemen, laundry workers, maintenance workers, minibar attendants, and room attendants are not its employees, but are employees of a subcontractor, K&H Management Corp. ("K&H").[4] It further argues that the front desk clerks are supervisors and/or managers

[3] The parties stipulated that the chief engineer was a managerial employee.
[4] Incorporated as K&H Cleaning Management Corp., later amended to K&H Management Corp.

within the meaning of the Act and that the bellpersons perform the functions of security guards and thus cannot be in a unit with non-security guards and cannot be represented by the Petitioner, a non-security guard union.

Petitioner argues that K&H is the alter ego of Employer Avalon and therefore its employees should be included in the employer-wide bargaining unit that it seeks and that the front desk clerks do not possess the requisite authority to make them statutory supervisors. Finally, Petitioner asserts that the bellpersons are not statutory guards.

I have considered the evidence and the arguments presented by the parties on each of these related issues. As discussed below, I find that Avalon and K & H are a single employers and that K & H is an alter ego of Avalon and they are herein jointly referred to as the Employer. I also find that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining.

To provide a context for my discussion of those issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning supporting each of my conclusions.

I. Operations and Overall Structure of Employer

Hotel Stanford, LLC, among its other holdings, owns and operates the Avalon, located at 16 East 32nd Street. The Avalon, which opened for business in September 1998, contains 100 rooms, including 80 suites.[5] The chairman of the Avalon, Joon Gab Kwon, is on the premises infrequently, as he maintains offices in other countries. The president of the Avalon, Do-Jun Hwang, works at the hotel six days a week. General

[5] The Avalon also owns a restaurant on the premises, the operation of which it subcontracts out. Petitioner does not seek to represent the restaurant employees.

manager, Marcio Azevedo, in running the day-to-day operations of the hotel, reports directly to Hwang.

II. Employee Classifications at Issue:

A. *Employees of K&H*

Towards the end of 2001, Azevedo and Hwang decided that for economical reasons and to receive "some extensive general cleaning,"[6] the Avalon would subcontract the housekeeping work. On November 15, 2002, Hwang approached Daniel (Jong Kon) and Justine Ko,[7] friends of his from church with no experience in the hospitality or maintenance industry and no experience running a business,[8] with the possibility of starting their own business.[9] Later that day, without altering the terms presented by Hwang, the Kos signed a Cleaning Service Agreement with the Avalon. Azevedo testified that he and Hwang chose K&H for "no specific reason." The job classifications "transferred" as a result of the subcontract included the housekeeping workers, housemen, laundry workers, maintenance workers, minibar attendants, and room attendants.[10] Four days after signing the agreement, K&H received its Certificate of Incorporation from New York State. No one from Hotel Stanford, LLC, including Hwang, owns any shares of stock in K&H, whose sole shareholders are Daniel and Justine Ko, the president and vice president/secretary, respectively.

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[6] Azevedo described this "extensive general cleaning" as somewhat different in nature from the day-to-day work done by the everyday housekeepers. However, the record does not provide any evidence of this general cleaning being performed following the decision to subcontract.

[7] The Ko's are husband and wife.

[8] When they signed the agreement, Daniel Ko's employment consisted of making deliveries for a trucking company and Justine Ko was an assistant manager at an apparel trading firm.

[9] Justine Ko testified that at this her and her husband were looking for a business to run at the time, but that they were not looking for any particular business.

[10] Payroll time sheets show there were 23 non-supervisory employees.

On November 18, Azevedo distributed a memo to the housekeeping staff, informing them of the subcontracting arrangement. On November 19, the effective date of the subcontract, the Kos met with the housekeeping staff. All were required fill out applications, which everyone eventually did. K&H hired all of the housekeeping employees, including housekeeping manager Bozena Mrozeiwska, but excluding two supervisors and the laundry manager.

The Cleaning Service Agreement provides for the Avalon to pay K&H a lump sum of $800,000 for a six-month period, ending May 14, 2003. It further provides, "[t]he next monthly lump sum payment shall be adjusted every six month[s] after Avalon's evaluation of [K&H's] reports." In addition to its cleaning obligations, K&H is required to submit "copies of the invoice or job record . . . includ[ing] its employees' names, addresses, telephone numbers (if available), payrolls including all benefit payments (insurance, uniform, medical, vacation, bonus, etc.)," as well as "all subcontractor expenses." The record shows that while the contract does not require it, the Avalon reimburses K&H for these expenses.[11] Additionally, while the contract explicitly provides for a lump sum payment, Azevedo describes the arrangement as being "cost plus."

Since the effective date of the contract, the Avalon has paid virtually all of K&H's expenses, including payroll,[12] health insurance,[13] workers compensation insurance, disability insurance, management and purchasing expenses (including petty cash, water, phone charges, and check printing), emergency supplies, CPA fees, sick day

[11] The Cleaning Service Agreement is the only written agreement between the Avalon and K&H.
[12] The payroll spreadsheet submitted to the Avalon includes the Kos.
[13] The health insurance agreement lists K&H as the insured, but provides Azevedo as the point of contact.

compensation for employees, and an advance payment so that K&H could open up a bank account. K&H pays these expenses after receiving checks from the Avalon. The Avalon directly purchases the supplies used by K&H employees. It does not appear from the record that the Ko's invested any money in K&H. According to invoices, the Avalon paid K&H slightly over $325,000 through April 10, 2003.[14]

K&H maintains a basement office formerly used by the housekeeping department of the Avalon. This is the only office ever used by K&H. The furniture in the office, including a file cabinet, computer, and telephone system is the same furniture previously used by the Avalon's housekeeping department. K&H does not pay for rent, electricity, heat, telephone charges, and photocopies (made using a copy machine in the Avalon's sales executive office). These expenses are borne by Employer Avalon.

K&H employees perform the same functions, receiving the same wages and benefits, as they did before the advent of K & H on November 19. Employees receive the same work assignment forms and punch the same clock as they did when they were employees of the Avalon.[15] It appears that K&H employees work from approximately 8:30 AM until around 4:30 PM.

The Kos and Mrozeiwska supervise all K&H employees. When calling in sick or requesting a shift change, employees call one of the managers from K&H. K&H employees receive work assignments forms from the Kos. On occasion, Azevedo directs the work of K&H employees.

Justine Ko testified that the Avalon does not tell K&H in advance what the payroll should be, and that without the Avalon's involvement, K&H recently hired part-time

[14] There appears to be a contradiction between the "lump sum" terms of the agreement and the monies actually paid to K & H. Nearly 75 percent of these invoice totals is for the payroll.
[15] The Avalon's employees punch this same clock.

housekeepers. After November 19, Azevedo claims to have no involvement in the hiring and disciplining of the housekeeping staff. However, on December 6, Azevedo issued a disciplinary warning to K&H employee Ivelisse Pichardo on the Avalon's letterhead, regarding Pichardo's absence from work on November 14.[16] Additionally, K&H employee Albert Castillo testified that he receives directions from employees of the Avalon, including Azevedo, on a daily basis. Castillo also received a disciplinary letter from Justine Ko regarding an uncompleted assignment, which explained how he could have contacted employees of the Avalon to receive full instruction on how to complete his duties.

B. *Front Desk Clerks*

The Avalon employs five "guest service managers" and three "reception managers" to work in the front desk area. Other positions staffed at the front desk from time to time include a front desk manager, a night manager/auditor and the general manager's executive assistant.[17] Front desk employees generally work one of three shifts: 7:00 AM to 3:00 PM; 3:00 PM to 11:00 PM; and 11:00 PM to 7:00 AM. Guest service managers report directly to the reception managers. The duties of both positions include checking guests in and out, taking reservations, answering phones, and taking care of concierge duties. Front desk clerks fill out the same checklist that lists their duties. It does not appear that front desk clerks have the authority to determine whether or not to accept someone's credit card or check.

[16] Azevedo carbon copied the memo to the Ko's and Mroziewska. The incident predates the effective date of the subcontract. However, the warning ends by stating that, "in view of the fact that we have warned you in the past regarding your excessive absenteeism, further disciplinary action on this matter will result in suspension up to and including termination."

[17] From the record, it appears that some front desk employees hold one or more of these titles. See note 18, infra.

Rick Mata, listed by the Avalon as a reception manager on their telephone list of Department Heads and Managers,[18] holds periodic managerial meetings. Guest service managers, reception managers, front office managers, and the bellpersons attend the meetings, the purpose of which is to discuss how to resolve problems. At the meetings, Mata discusses front desk procedures, but does not ask for any employee input on ways to improve problems.[19] It does not appear that non-department heads take part in policy formulation.[20]

While the hotel retains two distinct titles for front desk employees, it appears the front desk employees are unaware of these titles. Mata sometimes tells the front desk employees that they are managers so that they can make decisions. Front desk employees testified that they have never been involved in the hiring process, never have disciplined other employees, and never have recommended the discipline of any other employee. Azevedo stated that if a guest service manager found a disciplinary problem, he, along with the reception manager and the front office manager would make a group decision regarding whether or not to impose any discipline on an employee. There is conflicting evidence surrounding whether any front desk employee ever disciplined another employee,[21] and Azevedo testified he was unable to recall any

[18] Azevedo testified that the two reception managers were Michael Cruziak and Byron Rocha, neither of whom was listed on the telephone list. The list labels Mata and Tom Adams as reception managers. Azevedo further testified that Adams, Cruziak and Rocha also held the position of night manager/auditor. It appears that whatever the actual titles are of each employee, Mata is their supervisor.

[19] Guest service manager Carmen Garcia testified that she never attended a manager's meeting, which appears to include only department heads.

[20] Garcia testified that she never attended a meeting for department heads and that she has not been involved in making policy for the hotel.

[21] Azevedo testified that a former reception manager, Michael Feigenbaum, had once issued a written warning to Albert Castillo, but did not produce the written warning. Castillo testified that he never received any warning or other form of discipline from Feigenbaum.

specific instance when a reception manager disciplined another employee.[22] Gregory Gibson, currently a front desk employee,[23] testified that no one informed him that he had the authority to hire and fire, discipline, suspend, adjust grievances, or promote employees.

While Azevedo states that reception managers possess the authority to change the work schedule, in a memorandum dated June 22, 2002, Mata stated that there would be no schedule modifications made without his approval. Bellperson Abderrahim Elouannas testified that he speaks to Mata if he needs to schedule vacation or request time off. Carmen Garcia, a guest services manager, testified that she could not switch days off with other employees and that she speaks to Mata if she needs a day off. Mata's two-step policy for requesting time off requires all front office employees to: "(1) fill out a request form (at a minimum) two weeks before your requested date and submit it to Rick [Mata]; and (2) it will be reviewed and a reply will be returned approving or denying the dates requested."

Routinely, front office employees take calls from hotel guests requesting a missing item. In these situations, the front desk employee will pass along the request to either the bellperson or the housekeeper.

Up until about two years ago, front desk employees adjusted guest bills, but currently, all adjustments need to be approved by Mata. If a guest has a problem with their bill, a front desk employee will give the guest Mata's telephone number. Front desk employees do not have the ability to reduce customer's bills.

[22] Azevedo stated that disciplinary action is done in the form of feedback, and is not necessarily documented.
[23] At one time, Gibson also filled in as a bellman two days a week.

C. *Bellpersons*

The Avalon employs two people as bellpersons and three people listed as security. The hotel also describes bellpersons as "ambassadors". From the record, it appears that titles "ambassador" and "security" are what employees understand to be bellpersons.[24] Bellpersons generally work one of three shifts: 7:00 AM to 3:00 PM; 3:00 PM to 11:00 PM; and 11:00 PM to 7:00 AM.

Bellpersons duties include greeting a guest upon arrival, tending to guests needs, delivering newspapers, delivering checkout folios, and turning on the boiler if it shuts off. They interact with front desk employees when helping arriving guests check-in and when a front desk employee passes along guest requests. In the evenings, when there are no housekeeping employees on duty, bellpersons will perform necessary service and maintenance tasks.

About once a day, at 7:00 AM, the bellperson on duty enters a locked room and changes the tape from the security camera. Bellpersons do not monitor the tapes for suspicious activity. The security room also contains security reports and testimony shows that managers told the bellpersons to fill them out. Albert Vargas, a bellperson, filled out one such report after a guest provided him with information. The Avalon entered into evidence a second report filled out by a guest. It appears that bellpersons fill out security reports infrequently.

The Avalon contends that bellpersons are also responsible for "interrogating [room] locks." When someone "interrogates a lock", they examine the electronic lock to find out who entered a room and when they entered it. From the record, it does not appear that any bellperson has ever "interrogated a lock".

[24] The Avalon's front office schedule does not list any ambassadors, but does list bellmen and security.

For a substantial amount of the time, bellpersons stand near the door of the lobby. No one ever told the bellpersons that they were there for security purposes. Additionally, it appears that it is not part of a bellpersons job to walk around the hotel and make sure the place is secure. When the Mata informs bellpersons of their duties, he does not provide any instruction on performing security functions. Aside from informing patrons that they cannot smoke in the lobby (under the law), bellpersons do not enforce any rules of the Avalon.

According to the Azevedo, bellpersons also are responsible for checking the bags of all employees, including those working for K&H. Two bellpersons report never searching any employees' bag. Bellperson Vargas testified that sometime in March or April of 2003,[25] Mata instructed him to begin searching the bags of K&H employees, but Mata did not tell Vargas what do to when he was checking the bags, what to look for, or what to do if he found something.

It does not appear that bellpersons apprehend thieves and liaison with law enforcement officials as a formal part of their job. On one occasion, bellperson Wilson Narvaez[26] observed someone remove an ashtray from the hotel lobby without permission. Police later apprehended the person and included Narvaez's name on the criminal complaint, which describes Narvaez's involvement in the incident as an observer.

Bellpersons wear a black uniform, consisting of a black suit, a black shirt, and black pants. This uniform is identical to that worn by all employees at the front desk. It

[25] This instruction was issued at about the time the instant petition was filed.
[26] Narvaez began working for the Avalon as a houseman in the housekeeping department.

does not appear that the bellpersons wear any badges, patches, or other insignia that would distinguish them as a security guard.

Though not one of their main responsibilities, bellpersons occasionally perform check-in and check-out duties behind the front desk. Additionally, in at least one situation, an employee worked two days a week as a bellperson, and three days a week at the front desk. Another bellperson worked as both a houseman and a bellperson, before working fulltime as a bellperson. On the night shift, bellpersons will perform tasks normally performed by the housekeeping staff. From the Avalon's payroll records, front desk clerks and bellpersons each work approximately 40 hours a week. Excluding overtime, front desk clerks and bellpersons both receive gross wages between $500 and $600 for a 40-hour week.[27]

III. Analysis

A. Status of K&H Employees

The concept of alter ego is primarily found in the unfair labor practice area. It usually arises in situations where what purports to be two separate employers are in law and fact one employer that is not honoring its bargaining obligations. However, "the mere fact that the need to determine whether one entity is the alter ego of another often arises in an unfair labor practice context does not mean that the Board is precluded from making such a determination in connection with the resolution of a representational issue." *All County Electric Co.*, 332 NLRB No. 72 (2000) (citing *Elec-Comm, Inc.*, 298 NLRB 705, 706 fn. 2 (1990)). This is because alter ego status is an inquiry into the

[27] Only one employee listed on the payroll records, Tom Adams, makes significantly more than $600 per 40-hour workweek, at $670. However, as described infra, there is insufficient evidence to treat Tom Adams as a supervisor under the Act.

relationship of two separate entities and does not require a finding that an unfair labor practice has been committed. *Id.*

All County and *Elec-Comm* arose in the context of an existing bargaining relationship, with the employer petitioning for an election and the Board considering alter ego status to determine whether one entity was bound to follow the bargaining obligations of another. Petitioner argues, and I find, that the Board's decision on the appropriateness of the alter ego issue in representation proceedings is not limited to situations where there is an existing bargaining relationship. In considering the focus of the alter ego inquiry, the Board stated in general terms that a representational issue arises when determining whether two entities are sufficiently related. See *id.* Thus, it is appropriate to consider alter ego allegations in representation cases.

The relevant factors the Board considers in determining alter ego status are whether "the two enterprises have 'substantially' identical management, business purpose, operation, equipment, customers and supervision, as well as ownership." *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984); *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976). It is not necessary that each factor be present to find alter ego status. *Fugazy Continental Corp.*, 265 NLRB 1301, 1301-1302 (1982). The Board also considers whether the alleged alter ego was created with the purposes of evading bargaining responsibilities. However, a finding of intent is not necessary for the Board to make an alter ego finding. *Fallon-Williams, Inc.*, 336 NLRB No. 54 at 1 (2001). Applying the foregoing standards to the facts of this case, I find that K&H is the alter ego of the Avalon.

Evidence establishing that an alleged alter ego made no real investment in business assets will cast the separate ownership of two entities in doubt. See *Denzil S. Alkire,* supra. In *Denzil S. Alkire*, the Board found an alter ego where the successor company did not invest any capital, did not make any deposit or down payments on assets it acquired and did not pay other business expenses, including insurance and maintenance costs. *Id.* The owner and president of the alleged alter ego did not "reap any of the benefits associated with business ownership," receiving instead a salary deducted as an operating expense. *Id.* Similarly, while the Ko's are the sole shareholders of K&H, the record establishes that they never invested any money in the new company. The Avalon provided a $5,000 advance that met K&H's initial costs and paid every expense, including insurance and the Ko's weekly salary. Furthermore, K&H operates from an office in the hotel without paying for rent, electricity, or heat and uses equipment without compensating the Avalon. Thus, the nominal difference in ownership between the two entities appears irrelevant.

Even assuming two companies do not have common ownership, it is still possible to make an alter ego finding. See, e.g., *All Kind Quilting Inc.*, 266 NLRB 1186, 1194 (1983) (adopting administrative law judge's findings that common ownership was not given much weight due to the lack of an arms-length relationship between the companies); *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1226 (1982) (finding that degree of control exercised by one entity over the other "obliterate[d] any separation between them"). However, it appears that in order to discount the factor of common ownership there needs to be a strong presence of the other factors. See *All Kind Quilting Inc.*, supra; *American Pacific Concrete Pipe Co.*, supra.

The record provides an ample basis to support a finding that the Avalon and K&H have substantially identical business purposes, operations and equipment. Following November 19, the housekeepers employed by K&H perform the identical duties as they did while working for the Avalon, using the same work assignment forms. K&H uses the same office, furniture and telephone equipment previously used by the Avalon's housekeeping department. K&H also uses the same photocopy machine (free of charge) that the Avalon's sales executives use.

In the instant case, the evidence establishes the lack of an arms-length business relationship, and the circumstances surrounding the subcontract cast doubt on the Avalon's relationship with K&H. Before Hwang approached them, the Ko's had no experience in the hospitality or maintenance industries. This lack of experience appears to contradict the Avalon's desire to receive "some general extensive cleaning" that the existing housekeeping department could not perform. While Azevedo testified that the Avalon considered other companies to subcontract to, he could not recall the names of any of them. The Ko's are personal friends of Hwang, and did not negotiate the terms of the agreement. Finally, the "lump sum" terms of the agreement contradicts the assertion that there was a "cost plus" relationship based on the terms of the contract.

It also appears that the customer base of the two entities is identical. The only customer (for housekeeping services) of the Avalon and K&H is the Avalon itself, although it is possible that K&H may take on more customers in the future. However, at the present time, the customer base is limited to an exclusive relationship between these two entities.

There is evidence in the record showing that despite a change in supervisors, the Avalon still maintains some degree of supervision over K&H employees. Testimony establishes that K&H employees receive most of their work direction from the Ko's or Mrozeiwska. However, the record further establishes that Azevedo also directs the work of K&H employees on a daily basis and that the Ko's directed at least one K&H employee to seek out Azevedo if he had difficulties performing his duties.

Despite these numerous ties, the Avalon contends that K&H is not its alter ego, citing *Teamsters Local 776 (Pennsy Supply, Inc.)*, 313 NLRB 1148 (1994). However, *Pennsy Supply* is distinguishable on several grounds. First, the owners and operators of the alleged alter ego in that case had experience in the trucking industry and invested money into their new company. *Id.* at 1148-1149. Additionally, even though the Board found that the alleged alter ego used the equipment and received services from the other employer at below market cost, it concluded that there was a rational economic basis for this. *Id.* at 1164-1165. In contrast, the Avalon does not appear to have such an arms-length relationship with K&H. Accepting the Avalon's contention that it does not control payroll costs undercuts its argument that it subcontracted for economic reasons, as payroll accounts for nearly 75 percent of K&H's expenses. Overall, K&H appears to be nothing more than a renamed incarnation of the Avalon's housekeeping department with its own certificate of incorporation.

While closely related, the single employer and alter ego concepts are distinct. *Johnstown Corp.*, 322 NLRB 818 (1997). Thus, a finding of alter ego will not necessarily result in a finding of single employer, and vice versa. When two separate entities operate as a sufficiently integrated enterprise, the Board classifies them as a

single employer. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d. Cir. 1982). The four principal factors the Board considers in determining whether there is sufficient integration to find a single employer are the interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255, 256-257 (1965); *Sakrete of Northern California, Inc.*, 137 NLRB 1220, 1222 (1962), affd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). Not all of these factors need to be present, and "a significant factor is 'the absence of the arm's-length relationship found among unintegrated companies.'" *Denart Coal Co.*, 315 NLRB 850, 851 (1995) (quoting *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975), affd. in pertinent part sub nom. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1975)). As the Avalon and K & H have substantially identical business purposes, operations and equipment, are functionally integrated and do not have an arms-length business relationship, I also find the Avalon and K&H to be a single employer.

B. Status of Front Desk Clerks

Regarding the alleged supervisory status of the "guest service managers" and "reception managers," Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

Section 2(11) of the Act must be read in the disjunctive, and an individual therefore need possess only one of the enumerated indicia for there to be a finding that such status exists. *Mississippi Power & Light Co.*, 328 NLRB 965, 9690 (1999).

A party seeking to exclude an individual or group of employees based upon their status as supervisory employees bears the burden of establishing such status, if it in fact, exists. *NLRB v. Kentucky River Community Care*, 121 S. Ct. 1861, 1866-1867 (2001). Further, the Board has cautioned that in construing the supervisory exemption, it "has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981) (quoting *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970) cert. denied 400 U.S. 831 (1970)). Additionally, "the exercise of some 'supervisory authority' in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on an employee." *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Finally, titles are not determinative of supervisory status. *Golden West Broadcasters-KTLA*, 215 NLRB 760, 761 (1974).

Applying the foregoing standards to the facts of this case, I find insufficient support in the record to conclude that either the guest service managers or the reception managers possess the requisite authority to render them to be statutory supervisors.[28] The record establishes that both guest service managers and reception managers are not involved in the hiring process and never have terminated or

[28] While Ricky Mata is labeled as a reception manager on the telephone list of department heads, see note 18, supra, it does not appear that he is considered is considered a reception manager for the purposes of bargaining unit determination.

suspended employees. It also does not appear that they possess the authority to lay off, recall, promote, reward, or adjust the grievance of any employee.

With respect to guest service managers and reception managers disciplining or effectively recommending discipline, the record does not support a conclusive finding of the exercise any grant of independent authority. Azevedo testified that no guest service manager ever disciplined another employee but that once, a former reception manager had issued a written warning.[29] However, no evidence supports this claim and the employee in question testified that the reception manager never disciplined him. Furthermore, current front desk clerks testified that they do not possess authority to discipline. Therefore, evidence establishing the authority to discipline is inconclusive.

The Avalon argues that the guest service managers and the reception managers have the authority to effectively recommend discipline. However, Azevedo testified that disciplinary action is a group decision. Together with testimony that the Avalon never informed front desk clerks of the authority to discipline, the evidence shows that there is insufficient independent authority, if any, to effectively recommend discipline.

Regarding alleged instructions given to the bellpersons, testimony establishes that it is routine in nature and does not involve the use of independent judgment. Front desk clerks merely pass information along when they tell a bellperson that a guest requests a certain item. As these calls happen with regularity, front desk employees inform the bellpersons in a routine manner. Similarly, there is also nothing in the record supporting the Avalon's argument that guest service managers and reception managers have the authority to adjust the schedule of employees. Documentary evidence establishes that only Mata can make scheduling changes. The front desk clerks follow

[29] See note 21, supra.

a routine when filling out their daily checklist. See *McCullough Environmental Services, Inc.*, 306 NLRB 565, 565-565 (1992) (finding that alleged supervisors "merely relay directives" of additional tasks while working from a checklist).

While there is no specific provision for "managerial employees" in the Act, it has long been the Board's policy to exclude such employees from rank and file bargaining units. *Ford Motor Co.*, 66 NLRB 1317, 1332 (1946). Managerial employees have the authority to formulate, determine, and effectuate employer policies. *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980) (citations omitted). "The purpose of exempting managerial employees is to ensure 'that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.' " *Allstate Insurance Co.*, 332 NLRB No. 66 at 6 (2000) (quoting *NLRB v. Yeshiva University*, supra).

In the instant case, I conclude that the guest service managers and the reception managers are not managerial employees. While the Avalon argues that the front desk clerks have the authority to adjust guest bills, documentary evidence illustrates that such authority no longer exists. Instead, all adjustments require Mata's approval. The Avalon further argues that the front desk clerks extend the Avalon's credit by making reservations. However, the evidence does not establish that guest service managers and/or reception managers are responsible for setting room rates. Thus, the alleged managerial functions performed by the front desk clerks are routine in nature. Any discretionary authority currently or previously possessed by the front desk clerks is greatly restricted. Therefore there is insufficient evidence to establish that the front desk clerks are managerial employees.

The Avalon has not met its burden of establishing supervisory or managerial status of these contested positions. Accordingly, I find guest service managers and reception managers are protected employees under the Act.

C. Status of Bellpersons

Section 9(b)(3) prohibits the Board from including guards in a bargaining unit that includes non-guard employees. The section defines a guard as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." In consideration of the entire record, I have concluded that bellpersons are not guards within the meaning of Section 9(b)(3) of the Act.

Controlling the entrance to the employer's premises does not automatically confer guard status. In *55 Liberty Owners Corp.*, 318 NLRB 308 (1995), the Board considered whether doorpersons and elevator operators were statutory guards. As is the case with the bellpersons herein, the alleged guards regulated access into the buildings, but did not wear uniforms, badges or other insignia designating them as security personnel and they did not make rounds. *Id*. at *309.* Additionally, the Avalon, like the employers in *55 Liberty Owners Corp.*, does not employ any other security guards. *Id.*

The Avalon contends that the bellpersons perform an array of security functions. In support of its position, the Avalon cites *A. W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983), where the Board found that employees who spent over half their time performing security functions were guards, despite also performing maintenance functions. In that case, the alleged guards did not receive

formal training and did not wear special uniforms. The purported guards' primary duties were to determine which employees were carrying packages and to assure the safety of employees arriving at and leaving from work. In contrast, the evidence in the instant case does not establish that the Avalon hires bellpersons with the specific intent of meeting security needs. Cf. *Rhode Island Hospital*, 313 NLRB 343 (1993) (finding employees to be statutory guards where they were specifically charged with enforcing employers rules, protecting employers property, protecting the safety of persons on the property and regularly checking the employer's premises).

Employees performing guard-like functions incidental to the employees' primary duties are not guards within the meaning of Section 9(b)(3). See *55 Liberty Owners Corp.*, supra*;* see also *Ford Motor Co.*, 116 NLRB 1995 (1956). The evidence establishes that security functions encompass a small fraction of a bellperson's work. While the Avalon stresses that the bellpersons have keys to the security room and are responsible for changing the tapes in the surveillance cameras, bellpersons are rarely in the room, the tapes are changed only once a day, and they are not responsible for monitoring the tapes. Only recently did Azevedo instruct the bellpersons to begin searching other employees' bags, and did not tell them what to look for. Regarding the investigation of guest complaints and the filing of security reports, nothing supports a finding that bellpersons regularly perform these functions. Additionally, the incident where a bellperson assisted law enforcement officials in identifying a thief appears to be an isolated incident. Thus, I cannot conclude that the bellpersons are security guards.

D. Community of Interest

The community of interest test considers a number of factors, ensuring that employees within a bargaining unit possess a mutuality of interest in wages, hours and working condition. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962). Section 9(b) of the Act empowers the Board "[to] decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . . " Accordingly, employees working at the same facility under the same terms and conditions of employment constitute an appropriate bargaining unit. The fact that two or more groups of employees engage in different job functions does not by itself render an employer-wide unit inappropriate if other factors demonstrate a sufficient community of interest. See, e.g., *Berea Publishing Co.*, 140 NLRB 516, 518 (1963).

In the instant case, I conclude that the bellpersons, front desk clerks, housekeeping workers, housemen, laundry workers, maintenance workers, minibar attendants, and room attendants share a community of interest due to their work situs, interchangeability and contact among employees, and their shared terms and conditions of employment that warrants their placement in an employer-wide unit. All employees punch the same time clock, receive similar wages and generally work similar shifts. The bellpersons and the front desk clerks wear identical uniforms. The front desk clerks interact with both the bellpersons and the employees of K&H by informing them of guests' needs. The record establishes that Azevedo overseas all employees, including those of K&H. Regarding interchangeability, in at least one situation, a front desk clerk filled in as a bellperson, and in another, a bellperson began his employment as a

houseman. From the foregoing, I find no reason to deviate from an employer-wide unit as contemplated by the Act.

I therefore find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

> Included: All service and maintenance workers, including bellpersons,[30] front desk clerks,[31] housekeeping workers, houseman, laundry workers, maintenance workers, minibar attendants, and room attendants employed at the Avalon's facility located at 16 East 32nd Street, New York, New York.
>
> Excluded: All office clerical employees, managerial employees, professional employees, supervisors and guards as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time[32] and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.[33] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less that 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who

[30] Bellpersons include those designated as "ambassador" or "security."
[31] Front desk clerks include "guest service managers" and "reception managers," but exclude Ricky Mata.
[32] Pursuant to Section 101.21 of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.
[33] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[34] Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by Local 758, Hotel & Allied Services Union, SEIU, AFL-CIO. [35]

Dated at New York, New York
This 20th day of August 2003.

(s) Celeste J. Mattina
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Code: 177-1642
177-2401-6700
177-8520

[34] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **August 27, 2003**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. In the event the Petitioner notifies me that it does not wish to proceed to an election in the unit found appropriate, the election eligibility list will not be provided to Petitioner.

[35] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **September 3, 2003.**